

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

Gary W. Bastian, Commissioner
Commissioner of Labor and Industry,
State of Minnesota,

Complainant,

v.

**ORDER ON MOTION
FOR SUMMARY AFFIRMANCE**

Kenko, Inc.,

Respondent.

The above-entitled matter is before the undersigned Administrative Law Judge on Complainant's motion for summary affirmance. Complainant filed this motion on November 8, 1995. Respondent filed a memorandum in opposition to the motion on November 16, 1995. Additional correspondence was exchanged, and the record closed on November 27, 1995.

Mark W. Traynor, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, Minnesota, 55101, represented the Complainant. Robert D. Peterson, Esq., 3300 Sunset Boulevard, Suite 110, Rocklin, California, 95677, and James J. Brommer, Esq., 8990 Springbrook Drive, Suite 230, Minneapolis, Minnesota, 55433 represented the Respondent.

Based upon the Memoranda filed by the parties, all the filings in this case, and for the reasons set out in the Memorandum which follows:

IT IS HEREBY ORDERED:

1. That Complainant's motion for summary affirmance is DENIED.
2. That, at the request of the parties, the January 16, 1995 hearing shall be continued to a mutually agreed upon date in the future.

Dated this 22nd day of December, 1995

PHYLLIS A. REHA

Administrative Law Judge

MEMORANDUM

Respondent Kenko, Inc. ("Kenko") was hired by the St. Paul Water Utility to perform excavation work at a site located at St. Albans and Fairmont Streets in St. Paul, Minnesota. Kenko hired Ray Freeman ("Rayco") to dig a trench. On October 24, 1994, Robert Bastyr, an investigator with the Minnesota Occupational Safety and Health Division ("MN OSHD") of the Department of Labor & Industry ("Department"), inspected the worksite. As a result of the inspection, Kenko received a two-item citation under the Minnesota Occupational Health and Safety Act. Mr. Bastyr observed that the trench was dug in Type C soil, was 6.5 feet deep, approximately 12 feet wide across the top, 32 inches across the bottom, and 31.5 feet long. Mr. Bastyr determined that the trench was steeper than permitted under 29 C.F.R. § 1926.652(a)(1), and that the trench lacked an adequate protective system for workers such as a trench box. Mr. Bastyr also found that the spoil pile of excavated material was unrestrained at the edge of the trench directly over the area where employees of the St. Paul Water Utility were connecting a copper water line. Under 29 C.F.R. § 1926.651(j)(2), soil piles are required to be sufficiently restrained or kept at least two feet away from the edge of excavations.

Mr. Bastyr determined that the violations were serious, because a trench cave-in could cause a serious injury or death of an employee. (Complainant's Exhibit A at 6.) Mr. Bastyr also determined that the violations were repeated because, according to Mr. Bastyr's affidavit, Kenko violated the same standard for the same or similar hazard within the past three years. (Complainant's Exhibit A at 7.) Mr. Bastyr followed the MN OSHD Field Compliance Manual in calculating the penalties for the two violations. Taking into account the seriousness of the violations, and Kenko's size, good faith, and prior history of violations, Mr. Bastyr determined the penalties to be \$1500 for item 1 and \$1500 for Item 2. (Complainant's Exhibit A at 7.)

The Commissioner of the Department has brought a motion for summary affirmance. The Commissioner argues that there are no genuine issues of material fact, and that the citation should be affirmed as a matter of law. According to the Commissioner, Kenko's sole claim in opposition to this motion is that it should not be held responsible for a hazard created by its subcontractor. For the purposes of this motion, the Commissioner accepts that Rayco acted as a subcontractor and not an employee of Kenko. However, the Commissioner maintains that even if Rayco was a subcontractor for Kenko, and even if none of Kenko's own employees were exposed to the trench dug by Rayco, Kenko could still be cited for the improper trench and spoil pile because Kenko exercised supervisory authority over the safety of the worksite. The Commissioner has cited case law holding general contractors liable for OSHA violations

caused by subcontractors where the general contractors have supervisory authority and could reasonably have been expected to prevent or abate the violation. See, Secretary v. Classic Homes Division of Elite, Inc., 17 O.S.H. Cas. (BNA) 1114 (1995); Secretary v. Flint Engineering & Construction Co., 15 O.S.H. Cas. (BNA) 2052 (Rev. Comm. 1992).

As evidence of Kenko's supervisory control over the excavation, the Commissioner points out that an employee of Kenko, Steve Dallman, inspected the worksite three days before the Department's inspection. Mr. Dallman indicated on a form that the slope was "O.K.". (Complainant's Exhibit F). In addition, according to Respondent's own Answers to Interrogatories, Kenko's field superintendent inspected Rayco's work at least once a day and Ray Freeman attended Kenko's safety training meetings held at the worksite. (Complainant's Exhibit E, Answers to Interrogatories Nos. 2, 3 and 9). Therefore, the Commissioner argues that Kenko is liable for the OSHA violations of Rayco as a matter of law. The Commissioner also maintains that the violations were correctly classified as serious and the penalty was properly calculated pursuant to MN OSHD's Field Compliance Manual. The Commissioner has cited a case holding that cave-ins of a trench wall could result in serious injuries or death. Secretary v. Tarheel Underground Utilities Inc., 13 O.S.H. Cas. (BNA) 1347, 1348 (Rev. Comm. Judge 1987).

Respondent argues that the Commissioner's motion for summary affirmance must be denied because material issues of fact do exist. First, Respondent disputes that the slope of the trench was inadequate to provide protection. Pursuant to 29 CFR §1926.650, the appropriate degree of sloping depends upon the characteristics of the soil type and environmental conditions of exposure. Respondent challenges the investigator's measurement of the trench slope which was recorded in his report as "approximately 12 feet wide at the top, 32 inches at the bottom." Respondent asserts that he should be afforded the opportunity to address this issue on cross-examination. Next, Respondent argues that it had no employees at the worksite exposed to the alleged hazardous condition, and that it should not be held responsible for the actions of its subcontractor. Respondent also maintains that the alleged violations were not serious. Minnesota Statutes, section 182.651, subdivision 12, defines a "serious violation" as one creating substantial probability of death or serious physical harm, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation. Respondent asserts that the excavation work in question began on October 24, 1995, and that it had no knowledge of any violations prior to the Department's inspection. Respondent also argues that the Commissioner has failed to establish that the alleged repeated violations concern the same or substantially same condition cited in a prior final order. No evidence of the prior violation, beyond Mr. Bastyr's affidavit, has been submitted. Finally, Respondent challenges the method by which the investigator arrived at the proposed fine.

Summary affirmance or summary disposition is the administrative equivalent of summary judgment and the same standards apply. Minn. Rule 1400.5500(K). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Theile v. Stitch, 425 N.W.2d 580, 583 (Minn. 1980). When considering a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party. Ostendorf v.

Kenyon, 347 N.W.2d 834 (Minn. Ct. App. 1984). To successfully resist a motion for summary judgment, the non-moving party must demonstrate that genuine issues of material fact remain for hearing. Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. Ct. App. 1989)(citing Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2552-53 (1986)). While summary judgment is intended to secure just, speedy and inexpensive disposition, it is not designed as a substitute for trial where there are factual issues to be determined. Woody v. Krueger, 374 N.W.2d 822, 824 (Minn. Ct. App. 1985).

The Commissioner argues that summary affirmance is appropriate because Respondent has failed to put forth any evidence, beyond mere assertions, to create a genuine issue of material fact for hearing. The Commissioner cites Krogness v. Best Buy Co., Inc., 524 N.W.2d 282, 285 (Minn. Ct. App. 1994), for the proposition that a nonmoving party cannot rely on the pleadings alone to defeat a summary judgment motion, but must produce specific facts establishing genuine issues of material fact for trial. Krogness involved a breach of contract dispute between a real estate broker and principal. The broker claimed that the principle breached the terms of the listing agreement by denying him commission. The broker had the burden of proving his breach of contract claim. The court determined that the broker failed to produce specific facts to support his claim, and granted the principal's motion for summary judgment.

However, unlike Krogness, the nonmoving party in this matter does not bear the burden of proof at hearing. It is the Department that must establish the existence of the alleged violations and the extent of Respondent's supervisory authority as general contractor. While Respondent's lack of additional affirmative evidence is troubling, it does not necessarily entitle Complainant to summary affirmance where issues of material fact are found to exist. After viewing the facts in the light most favorable to the Respondent, the Administrative Law Judge finds, for purposes of this motion only, that there are genuine issues of material fact as to the existence of the OSHA violations, the nature of Respondent's employment relationship with Rayco, the extent of Respondent's supervisory authority over the worksite, and the calculation of the penalty. Therefore, Complainant's motion for summary affirmance is denied.

P.A.R.